BLANK PAGE

FILE COPY

FILED
FEB 7 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1940—#517.

WALTER M. HORT,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR PETITIONER.

WALTER J. ROSSTON,
EDWIN HORT,
Attorneys for Petitioner.

THE COURT PRESS, N. Y. C.

BLANK PAGE

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	1
Statute Involved	2
Statement of Facts	3
Question Presented	5
POINT I—The cancellation of the lease resulted in a loss not a gain under the rule promulgated by the Circuit Court of Appeals, Seventh Circuit in a similar case which the Circuit Court of Appeals, Second Circuit has refused to follow in the present case	5
Leaseholds Have Always Been Regarded in Law as Separate and Divisible From the Fee and Are Readily Evaluated in Law, Apart From the Fee, By Well Known and Recognized Rules	8
POINT II—The decision of the Second Circuit Court of Appeals, in this case, is based solely upon the authority of that Court's earlier decision in the *Warren Service Corporation* case. There is, however, a fundamental difference between the *Warren Service Corporation* case and the present case	11
POINT III—There was no recoupment nor any possibility of recoupment in the case at bar	14
POINT IV—The Board of Tax Appeals distinctly found and held that the transaction was not a sale of property yet it applied to the case the rule of loss applicable to purchase and sale of property to wit, cost less amount realized on disposition. This was error	18
Conclusion	19

Table of Cases Cited:

PAGE

Clarkson v. *Skidmore*, 46 N. Y. 297 8

Commissioner of Internal Revenue v. *Langwell Real Estate Corporation*, 47 Fed. (2) 841 (Seventh Circuit) 5, 6, 7, 11, 14

Commissioner of Internal Revenue v. *Langwell Real Estate Corporation*, 30 B. T. A. 145 ..... 7, 11, 14

Denman v. *Brumback*, 58 Fed. (2) 128, Sixth Circuit 17

H. T. Josey v. *Commissioner of Internal Revenue*, 104 Fed. (2) 453, Tenth Circuit 12, 13, 17

Larking v. *Misland*, 100 N. Y. 212 8

Mack v. *Patchin*, 42 N. Y. 167 8

People, ex rel. U. S. Rubber Co. v. *Knoff*, 232 N. Y. 153 8

Rae Company v. *Courtney*, 250 N. Y. 271 9

Ralph H. Plumb, 7 B. T. A. 295 8

Rhodes v. *Commissioner of Internal Revenue*, 100 Fed. (2nd) 966, Sixth Circuit 15, 17

United States v. *White Dental Co.*, 247 U. S. 398 17

Warren Service Corporation v. *Helvering*, 110 Fed. (2) 273 ..... 1, 11, 12, 13, 14, 17

Other Authorities Cited:

Judicial Code, as amended by Act of February 13, 1925, Section 240 (a) 1

Revenue Act of 1932, c. 209, 47 Stat. 169:

Section 22 2

" 23 2

" 101 2

IN THE

Supreme Court of the United States

October Term, 1940—#517.

WALTER M. HORT,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR PETITIONER.

Opinions Below.

The opinion of the Board of Tax Appeals (R. 19-26) is reported in 39 B. T. A. 922. The opinion of the Circuit Court of Appeals is reported in 112 Fed. (2) 167 and was *per curiam* as follows: "Order affirmed on the authority of *Warren Service Corporation* versus *Helvering,* 110 Fed. (2) 273."

Jurisdiction.

This appeal involves income taxes of the petitioner for the year 1933 in the amount of $38,070.71. The judgment of the Circuit Court of Appeals, Second Circuit was entered May 27th, 1940. Jurisdiction is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

This cause comes here by virtue of a writ of certiorari granted on November 25th, 1940.

Statute Involved.

Revenue Act of 1932, c. 209, 47 Stat. 169:

"SEC. 22. GROSS INCOME.

(a) *General Definition.* 'Gross income' includes gains, profits, and income derived from * * * dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * * * *

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * * * *

(e) *Losses by Individuals.* Subject to the limitations provided in subsection (r) of this section, in the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

* * * * * * *

'(2) if incurred in any transaction entered into for profit, though not connected with the trade or business; or'

* * * * * * *

SEC. 101. CAPITAL NET GAINS AND LOSSES.

* * * * * * *

(c) *Definitions.* For the purpose of this title—

(1) 'Capital gain' means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921."

Statement of Facts.

On March 7, 1928 the petitioner inherited from his father who was the owner in fee thereof the premises 76 Madison Avenue, New York City, a business building, the ground floor and basement of which, at that time, was occupied for banking purposes by Irving Trust Company of New York, a very substantial and financially responsible banking institution. The Bank was a tenant of said premises under a lease which was to expire on January 31, 1932 (Stipulation of Facts, p. 35). In order to assure that at the expiration of its lease the Bank could continue in uninterrupted possession of the demised premises, the Bank entered into a further lease of the premises with petitioner's father in 1927 for a term of fifteen years, to commence February 1st, 1932 upon the expiration of the prior lease. The rental under the new lease was $25,000 per annum (Stipulation of Facts, p. 35).

In December 1933, as the result of negotiations initiated by the Bank and at a time when the unexpired term of said new lease was thirteen years and two months, the petitioner as landlord and the Bank as tenant, by mutual consent, cancelled said new lease thus entirely releasing the Bank as tenant from any further obligation to pay rent for the unexpired term (Petitioner's Exhibit 5, Annexed to Stipulation of Facts, p. 38). The amount of such rental for the unexpired term, at the rate of $25,000 per annum, totaled $329,166.67 to which sum the petitioner, by such cancellation, relinquished all claim.

As a consideration for such cancellation, the Bank

(Figures in parentheses refer to pages of record.)

paid to the petitioner at the time of the cancellation $140,000 in cash (p. 38).

The full amount of this $140,000 the Commissioner contends is income for the calendar year 1933, in which year it was received by the petitioner.

The petitioner contends, upon the facts appearing uncontradicted in the record, that instead of income or gain of any kind to the petitioner, the transaction resulted in an actual loss to the petitioner in a substantial sum; or, in any event, that if the transaction did not actually result in a loss it at least resulted in no income or gain of any kind to the petitioner.

The question involved is purely one of law, as the facts upon which the petitioner bases his claim of loss are wholly uncontradicted.

The petitioner could not have negotiated another lease, with a responsible party, for the unexpired term of the cancelled lease, for a rental equal to the rental provided for the unexpired term of the cancelled lease (R. 46, 47, 50, 51, 52 and 56). The respondent offered no proof to the contrary.

As a matter of fact, the formerly demised premises remained vacant subsequent to the cancellation of the lease and were still vacant when about three months later in March 1934 as a result of mortgage foreclosure proceedings, a receiver took possession of the property (R. 9). In fact the premises were not relet even in part until long subsequent to the foreclosure sale. In 1937 the successors in title on such sale relet part of the premises (R. 51).

It was thus established that the possibility of recoupment of his loss by the petitioner's re-renting of the premises was destroyed. There was no surplus moneys as a result of the foreclosure (R. 60).

It further appeared that the lease in question was

in existence at the time the petitioner inherited the property and that at that time the market value of the property as it then existed with said lease thereon was appraised for estate tax purposes, and that such taxes were computed and paid upon such appraisal of $650,000 (p. 36).

Question Presented.

In order to ascertain whether a transaction involving a cancellation of a lease resulted in a gain or a loss to the taxpayer, is it proper to consider only the amount which the taxpayer received upon the cancellation and disregard the consideration given by the taxpayer to obtain such amount?

POINT I.

The cancellation of the lease resulted in a loss not a gain under the rule promulgated by the Circuit Court of Appeals, Seventh Circuit in a similar case which the Circuit Court of Appeals, Second Circuit has refused to follow in the present case.

There is good authority to support the petitioner's contention that the transaction in question resulted in a loss and not a gain of any kind, since the petitioner could not negotiate a new lease as favorable as the lease which was cancelled.

The identical question arose in 1931 in the Circuit Court of Appeals, Seventh Circuit.

Commissioner of Internal Revenue v. *Langwell Real Estate Corporation,* 47 Fed. (2) 841 (Seventh Circuit).

In the *Langwell* case, *supra,* a long term lease was cancelled by mutual consent of the lessee and of the taxpayer who was the owner of the premises by deed from the original lessor. (We shall refer to the transferee as the lessor.) At the time of the cancellation, the lessor held $50,000 of the lessee as security for the faithful performance by the lessee of the terms of the lease, said sum to be returned to the lessee at the expiration of the term, with interest. As the consideration for the cancellation it was agreed between the lessor and lessee, that the lessor keep the $50,000.

It was held by the Circuit Court of Appeals that the lessor was enriched in said sum, unless it appeared that the lessor "suffered a loss by reason of the termination of the lease." The sole test laid down by the Court for determining whether a loss was suffered is in the words of the Court:

> "If respondent could have readily negotiated another lease with a responsible party, as favorable as the lease which was cancelled, it suffered no loss. On the other hand, if it could not have negotiated such a lease, then it suffered a loss. The amount of such loss, if any, was the legitimate subject of proof. The actual execution of a new lease was not necessary to the determination of this issue. The rental value of such property could be shown by oral testimony."

The *Langwell* case is factually similar to the case on appeal so far as concerns the cancellation of the lease and the consideration therefor. Of course, it is wholly immaterial whether as in the *Langwell* case, it was agreed that the lessor was to retain absolutely a large sum then in its possession, which it otherwise

would have had to return to the lessee, or the lessor received a large sum from the lessee at the time of the cancellation.

In the *Langwell* case the matter was sent back by the Circuit Court to the Board of Tax Appeals for rehearing on the issue of loss. The Board found on the rehearing that the lessor had not suffered any loss on the evidence presented. (30 B. T. A. 145.)

No attempt will be made in this brief to review the evidence submitted on the hearing on the present appeal before the Tax Board as no attempt was made by the respondent to contradict the convincing evidence presented by the petitioner, that the premises could not be as favorably relet after the cancellation as they had been under the terms of the cancelled lease. The respondent appears not to question the sufficiency of this proof, but only that the principle laid down by the *Langwell* decision is erroneous and should not be followed.

The petitioner rested upon the precedent of the *Langwell* case both before the Board of Tax Appeals and the Circuit Court of Appeals, Second Circuit.

The underlying theory of the *Langwell* case is well supported by the law laid down by the Courts of New York State, which law affects the status of the lease in question as the real property is situated in New York and the tax return was filed in the New York District. Under the law of New York the lease was an asset of the petitioner with a definite appraisable value at the time of its cancellation. The petitioner was deprived of this valuable asset and the question as to whether a lease is a valuable asset is determinable by the rule laid down by the Courts of New York State. A similar rule was also applied in the *Langwell* case by the Circuit Court of Appeals.

Leaseholds Have Always Been Regarded in Law as Separate and Divisible From the Fee and Are Readily Evaluated in Law, Apart From the Fee, By Well Known and Recognized Rules.

The propriety of treating a lease as a distinct property interest apart from the fee has many times been adjudicated as has been the method of evaluating a lease apart from the fee value.

The question has arisen in a variety of cases such as inheritance tax proceedings, in re

Ralph H. Plumb, 7 B. T. A. 295.

Mortgage recording tax proceedings, in re

People, ex rel. U. S. Rubber Co. v. *Knoff,* 232 N. Y. 153.

Surplus money proceedings on mortgage foreclosures, in re

Larking v. *Misland,* 100 N. Y. 212.

Damages for the value of a lease extinguished by mortgage foreclosure.

Mack v. *Patchin,* 42 N. Y. 167.

Value of a lease for the purpose of determining the extent to which a lessee is entitled to share in surplus money proceedings resulting from a mortgage foreclosure.

Clarkson v. *Skidmore,* 46 N. Y. 297.

Invariably the courts have held in all such cases that a leasehold is in and of itself property which according to the facts and circumstances may have

value either to the lessor or lessee which can be definitely appraised.

Likewise it has been held that a leasehold can be a valuable asset of either the lessor or the lessee but cannot at the same time be an asset to both.

The test laid down by the courts is simple. A lease is an asset of value to the lessor if the rent payable to the lessor under the lease is greater than the rental value of the demised premises. If the rent payable is less than the rental value then the lease is a valuable asset to the lessee and a burden to the lessor.

This doctrine has long been established in the law and is based on good reason and sound business principles.

Thus in

Rae Company v. *Courtney,* 250 N. Y. 271.

A lease provided that the lessee had the option to purchase the building at a "proper consideration". The Court was called upon to fix the amount of the "proper consideration". It appeared that the lease in question had sixteen years to run at the time of the exercise of the option to purchase by the lessee. That the rent reserved in the lease was $2,000 a year and that the rental value of the demised premises was $4,000 a year. The Court held that the lease was a burden to the property as it was less than the rental value. The Court said at page 274:

> "If the lessors had desired to sell the premises subject to the lease, they would have been obliged to deduct from the market value of the property the amount of the encumbrance of the lease."

The Court held that the market value of the property without a lease was $100,000 but that the burden of the lease brought the market value down to $70,000 and that the purchaser was only required to pay the latter sum.

It is clear that this rule applies both ways and that if in a given case a lease is a profitable one to the property owner, that is, the rent reserved over a substantial period is greater than the rental value for the same period, the market value of the property must be increased accordingly.

This is clearly the law in the State of New York in which State the property in question is situated. The taxpayer is a resident of New York. The Estate through which the taxpayer originally inherited the property was administered in New York pursuant to the laws of New York. It therefore appears conclusively that in all proceedings, inheritance tax or otherwise in which the market value of the property in question was appraised, the foregoing rule governing appraisals of real property subject to a lease was employed.

It is therefore clear that the valuable and advantageous long term lease upon the premises owned by the taxpayer was an important element in fixing the value of the property in question in the Inheritance Tax Proceedings aforementioned and in any and all other proceedings brought to determine the market value of the property.

It is also apparent that it is manifestly unfair and unreasonable to have imposed a large Inheritance Tax upon this taxpayer by reason of the large value placed upon the property inherited by him in view of the fact that the property was subject to a lease of great advantage to the property and then, in the

present proceedings, ignore the fact that in losing such lease the taxpayer lost a valuable asset upon which he had previously paid a large tax.

It is apparent that the present case comes clearly within the decision of the *Langwell* case *supra* and that the *Langwell* decision is based upon a sound and accepted doctrine of law—that a leasehold in and of itself has a definite ascertainable value and its premature termination for a sum certain may result in gain or loss depending on the facts, just as in the case of other property, and may be the subject of a gain or loss like any other property.

POINT II.

The decision of the Second Circuit Court of Appeals, in this case, is based solely upon the authority of that Court's earlier decision in the *Warren Service Corporation* case. There is, however, a fundamental difference between the *Warren Service Corporation* case and the present case.

The difference to which we refer is that in the *Warren Service Corporation* v. *Commissioner of Internal Revenue,* 110 Fed. (2) 723, there was actual recoupment and probability of further recoupment of the taxpayer's loss on the cancellation of the lease since the premises continued to be owned by the taxpayer after the cancellation, and were relet by the taxpayer immediately thereafter for $30,000 per annum, later increased to $40,000 for a five-year term.

In the instant case, the record shows no recoupment to the taxpayer and that the loss of the property by mortgage foreclosure within a few months

after the cancellation made any recoupment impossible.

The Court in the *Warren Service Corporation* case makes specific mention in its opinion of the recoupment feature of that case. The Court says:

> "It (the taxpayer) urges that it surrendered a contractual right to receive annual rentals far in excess of any sum for which it has been able to relet the premises. But this does not establish a deductible loss in 1933 (the year of the cancellation), it shows merely a diminution of expected income during that year and subsequent years. The taxpayer has sustained no loss of property in the income tax sense. *The land and building were and still are owned by the taxpayer and they have produced income.*" (Italics ours.)

That decision was rendered in 1940 and apparently the proof in that case showed that seven years after the cancellation of the lease the relet property was still bringing a very substantial income to the taxpayer.

Likewise in the case of

> *H. T. Josey* v. *Commissioner of Internal Revenue,* 104 Fed. (2) 453, Tenth Circuit

cited in the opinion of the Court in the *Warren Service Corporation* case *supra,* the taxpayer continued to remain the owner of the real property subsequent to the cancellation of the lease, and actually received rental therefrom for a period of years thereafter. The fact that in the *Warren Service Corporation* case the taxpayer continued to hold title to the property was apparently considered an important

factor, which is evidenced also in the opinion of the Board of Tax Appeals in that case, which dwells upon the subject and cites authority to support its opinion on the point. 39 B. T. A. 856.

It therefore appears that in both the *Warren Service Corporation, supra,* case, and the *Josey* case, *supra,* there was lacking the necessary evidence that the loss was fixed beyond recoupment. In fact, the contrary appeared in both of said cases.

In the instant case we have not only the loss of the lease, but also the subsequent loss of the freehold following shortly thereafter, without any recoupment during the interim.

Such point as may be made by the respondent that the loss of the freehold has occurred in the following tax year and must be disregarded is discussed under Point III of this brief.

Upon a first reading of the opinion in the *Warren Service Corporation* case, *supra,* it would appear that the decision rested upon two independent grounds, to wit, that "there was merely a diminution of expected income during that year and subsequent years", and that "The land and building were and still are owned by the taxpayer and they have produced income". These grounds must be read together. The Court undoubtedly speaks of a diminution because the income during the year and subsequent years was actually diminished according to the facts of that case. The taxpayer still owned the property and was still receiving income therefrom after the cancellation of the lease. In fact, the premises in that case were practically relet to the same tenant but at a reduced rent. The word "diminution" could hardly have been used if the rent and income from the demised premises had entirely ceased, never to be restored in

any sum because the taxpayer had lost his ownership of the property as in the case at bar.

The Circuit Court in the *Warren Service Corporation* case, *supra,* further says: "The difference between the income actually received and the income the taxpayer had expected to receive is not a deductible loss. What has been lost is merely prospective income".

The fallacy is in applying this rule, if it be a proper rule, to the instant case where the loss is not merely one of prospective income, but the actual loss of income bearing property or property rights. The amount of monetary damage suffered by the loss of such property or property rights can be definitely computed according to the *Langwell* case and the other authorities cited herein under Point I.

It would therefore clearly appear that the *Warren Service Corporation* case, *supra,* furnished no authority to the Circuit Court of Appeals, Second Circuit, in reaching its determination in the case at bar.

POINT III.

There was no recoupment nor any possibility of recoupment in the case at bar.

It is immaterial that the loss of the freehold which followed the cancellation of the lease by a few months occurred during the subsequent tax year. The fact of its occurrence regardless of when it occurred, furnishes the proof that there could be no recoupment, provided, as is the case here, there was no recoupment in the interim.

Between the time of the cancellation of the lease and the loss of the real property by foreclosure, the

record shows that the demised premises were not re-rented. The cancellation occurred in December 1933. The foreclosure and receivership therein which deprived the taxpayer of possession and all right to collect rent occurred in March 1934 (R. 9). The foreclosure sale was in 1935 and clearly relates back to the date of the commencement of the action and the appointment of the receiver in March 1934. The formerly demised premises were not relet even in part until March 1st, 1937, by the successor in title (R. 51).

Thus all speculation as to the possibility of recoupment of the taxpayer is wholly avoided. There was no recoupment and none is possible.

It has been recently held by the Circuit Court of Appeals that the fact that the taxpayer continues to hold title to real property does not necessarily deprive him of the right to claim that he has lost the value of the property.

Rhodes v. *Commissioner of Internal Revenue,* 100 Fed. (2nd) 966, Sixth Circuit.

In the *Rhodes* case, *supra,* the taxpayer deducted a loss for real property which he claimed had become worthless because of hurricane damage, general business depression and reduction in land values. The property was sold for non-payment of taxes but the taxpayer had redemption rights. The Circuit Court of Appeals reversed the Board and held that a tax sale of real estate owned by the taxpayer together with evidence of the surrounding circumstances was such an identifiable event as would give ground for a loss on real property even though there were rights of redemption, and the taxpayer still retained title.

The reasons for the Circuit Court's reversal are

stated in its opinion in substance as follows at page 969:

> "Common sense interpretation is the safest rule to follow in the administration of income tax laws. Gross income and deductions flow from trade, commerce and dealings in property carried on in the ordinary business way, and in the determination of taxes men should measure both by ordinary every-day business standards.
>
> In arriving at losses the taxpayer should determine in the first instance the tax year in which sustained, and such deductions should be allowed by the Commissioner of Internal Revenue unless it appears from the facts that the taxpayer was clearly unreasonable and unfair at the time he was compelled to make his decision. Subsequent events may show a taxpayer to have been wrong but these must have been ascertainable by the exercise of ordinary business care and judgment at the time he made his income tax return."

At page 970:

> "The Board rested its decision largely on its rule that a loss on real estate is not deductible so long as the taxpayer retains title in fee.
>
> The unsoundness of this principle is readily apparent when subjected to the searchlight of reason. The ownership of real estate may become a burden with recurring taxes and the impossibility of finding a purchaser at any price. * * * The loss statute makes no distinction between real and personal property and there may be an abandonment of real estate in a very practical sense without the taxpayer divesting himself of legal title."

In *Denman* v. *Brumback,* 58 Fed. (2) 128 (Sixth Circuit) cited in the *Rhodes* case, a similar situation was presented. In that case the taxpayer claimed a loss because his real property had been rendered valueless by a heavy special tax assessment. The property was not disposed of by the taxpayer who continued to retain title, but he claimed an abandonment of the property which was sold the following year for non-payment of taxes. The Circuit Court of Appeals held that the loss was deductible. In referring to the rule followed by the Board that there must be a sale or closed transaction during the taxable year the Court said at page 129:

> "We think no such inflexible rule is to be found either in the statute or the regulation. We think the case falls within *United States* v. *White Dental Co.,* 247 U. S. 398."

In the *White* case cited *supra* this Court held at page 403 that "The Taxing Act does not require the taxpayer to be an incorrigible optimist." This Court held in that case that seizure of the taxpayer's property by a foreign power was a deductible loss even though there was a possibility that there might be recoupment by prosecution of the taxpayer's claim before the Mixed Claims Commission.

The fundamental difference between the facts in the case at bar on the question of recoupment and those in the *Warren Service Corporation* and the *Josey* cases, *supra,* makes the latter cases inapplicable.

POINT IV.

The Board of Tax Appeals distinctly found and held that the transaction was not a sale of property yet it applied to the case the rule of loss applicable to purchase and sale of property to wit, cost less amount realized on disposition. This was error.

One of the issues before the Board in this case was whether the gain if any was capital gain or ordinary income. The Board held that it was ordinary income since the transaction was not a sale or exchange of property in any sense. The Board stated in its opinion (p. 26):

> "Neither business men nor lawyers refer to the cancellation of a lease as a sale or exchange. The $140,000 received by the petitioner is not capital gain but is taxable to the petitioner as ordinary income."

Despite this ruling the Board held (p. 24):

> "The petitioner has failed to prove any figures from which a loss could be computed. A loss from the disposition of property is computed for income tax purposes by deducting the amount realized from the adjusted basis."

Later the Board states that "basis is always cost or some substitute therefor".

In one instance the Board holds that the transaction is not a sale or like disposition of property; in the other instance it holds that there is no loss because there has been no compliance with the rules of proof to establish loss on a sale or like disposition of property.

Since it has been held in this case that the transaction is not a sale or exchange of property, we must

examine the transaction as one from which income or profit arises other than from a sale or exchange. This being so, the existence or non-existence of an original cost plays no part in determining the net income.

The net income in such a transaction must always be the gross intake less the value of the consideration given for the intake less also deductible expenses. We are not concerned in this case with deductible expenses, but the value of the consideration surrendered by the taxpayer in order to entitle him to receive the intake must be deducted or a grave injustice has been done.

The consideration surrendered by the taxpayer as an essential to the consummation of the transaction were his rights, property and interest in a long term lease which the Courts have uniformly held to be a property right readily evaluated in the manner set forth under Point I hereof.

Where a transaction has resulted in a loss to the taxpayer, the taxpayer cannot, in justice and equity be assessed for a gain, and this is so even though there may be difficulty in finding a particular tax statute or rule applicable to the transaction.

The absence of such a statute or rule does not make just and equitable what is not so.

CONCLUSION.

The judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

WALTER J. ROSSTON,
EDWIN HORT,
Attorneys for Petitioner.